Circuit Court for Baltimore County
Case No. K-16-0872

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1967

September Term, 2016

KENNETH BATSON

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: February 8, 2018

Following a jury trial in the Circuit Court for Baltimore County, Kenneth Batson ("Batson"), appellant, was convicted of second-degree assault, first-degree assault, and attempted second-degree murder. Batson was sentenced to a total term of thirty years' imprisonment, with all but twenty years suspended. On appeal, Batson presents two questions for our review:

1. Did the circuit court err in admitting evidence that Batson had previously assaulted the complainant?

2. Did the circuit court err in denying Batson's motion to dismiss the indictment?

For the reasons stated herein, we shall affirm the judgments of the circuit court.

BACKGROUND

We set forth the facts in the light more favorable to the prevailing party below. In the early morning hours of January 1, 2016, Batson physically and sexually assaulted his wife, Angela Batson, at the couple's home in Baltimore County. Following the assault, Mrs. Batson met her ex-husband, John Rossi ("Rossi"), at Rossi's home and reported the assault. Mrs. Batson then contacted the police, and Batson was ultimately arrested and charged.

On May 3, 2016, the circuit court held a pretrial hearing regarding a joint request for a postponement of Batson's trial, which was scheduled to begin on May 24, 2016. At that hearing, the State indicated that it was planning to "do DNA testing in the case" and that defense counsel was requesting a postponement, which the State did not oppose, in order for the DNA testing to be completed. Defense counsel responded that he had spoken

with the prosecutor and "was under the impression that the State had already done the DNA testing or was in the process of doing that." The State denied that the prosecutor "implied to counsel that DNA testing was already done or was being done," but the State nevertheless agreed to the postponement. The court granted the postponement request and set a new trial date of August 2, 2016. Batson's trial was postponed again (for an unrelated matter), and a new date was set for August 8, 2016.

At the start of trial, defense counsel moved to dismiss the indictment, arguing that "there was DNA evidence taken in this case and the State for whatever reason decided not to test the DNA." Defense counsel maintained that certain DNA evidence had been procured from Mrs. Batson at the hospital following the sexual assault and that, as a result, the State was required to have that DNA tested "as soon as reasonably possible." Defense counsel also maintained that, had the DNA testing been done, it may have shown that someone other than Batson had committed the crime because, according to Batson, Mrs. Batson had sexual relations with another individual on the same day as the assault. Defense counsel further argued that Batson agreed to the May 3rd postponement only after the State promised to complete the DNA testing and that the State reneged on that promise.

The prosecutor responded that he was not present at the May 3rd hearing, that a second prosecutor was standing in for him at the time, and that he did not receive the case file until much later, which he indicated was "an oversight." The prosecutor explained that, when he "checked into it" in July, he realized that the DNA testing had not been done but that there "would not be enough time to get the DNA done." The prosecutor further explained that he did not request DNA testing earlier in the case because "it wasn't one of

those type of cases where it was sort of who done it in my mind." The circuit court then asked the State to clarify its position, at which time the following colloquy ensued:

> THE COURT: So when you say you didn't request it early on, you're talking about before there was ever a request for a postponement?
>
> [STATE]: Yes, Your Honor.
>
> THE COURT: So at some point somebody thought it was something that was going to need to be done because [the second prosecutor] certainly wouldn't have said to [the court] I want a postponement to get DNA testing if he had no intention of getting that DNA tested.
>
> [STATE]: Absolutely.
>
> THE COURT: So when did that change?
>
> [STATE]: That was at the Defense's request. That's the conversation that we had that led to the postponement request and [the second prosecutor] standing in for me. It was the Defense's request to get the DNA tested. So I was going to sort of do –
>
> THE COURT: The Defense requests that you get the DNA tested?
>
> [STATE]: That I get the DNA tested, yes. So that then led to the conversation – you know, that led to the sort of oversight. It was not some sort of nefarious intent where I was intentionally not getting this done. By the time I realized, I didn't have enough time to get a request in and then done by the trial date.
>
> * * *
>
> THE COURT: Okay. So if I understand this – let's just take it chronologically if we could. Initially as the prosecutor assigned to this case, you were not inclined to have the DNA tested?

[STATE]: That's correct, Your Honor.
THE COURT: All right. Then [defense counsel] or someone in his office approached you and said well, I would like you to get that DNA tested.

[STATE]: Yes, Your Honor.

THE COURT: You then said I will.

[STATE]: Yes.

THE COURT: And that was the basis for a request for postponement in front of [the court] where [the second prosecutor] stood in for you?

[STATE]: Yes.

* * *

THE COURT: Okay. So then we can agree, I think, that [defense counsel] and his client and his associates had every reason to rely on your word that you were going to get that done.

[STATE]: Absolutely. Yes, Your Honor.

THE COURT: And then it was not done, but is was not done for nefarious or underhanded or sneaky reasons. It was not done simply because [the second prosecutor] did what he was asked to do, he put the case filed back in the file drawer and by the time it was revisited, you felt it was too late to obtain the DNA testing prior to today's trial date.

[STATE]: Yes, Your Honor.

The court ultimately denied Batson's motion to dismiss but gave Batson the option of requesting a postponement. The court also offered to sign an order asking that the State laboratory expedite the DNA testing. The court even proposed that, before Batson decided whether to request a postponement, the prosecutor contact the laboratory and find out how

long the DNA testing would take. The State ultimately determined that the testing would take approximately two months. After conferring with defense counsel, Batson decided not to request a postponement but rather to proceed with trial.

The court then moved on to other motions filed by Batson, one of which involved prior allegations of assault made by Mrs. Batson against Batson eight years prior. The court asked the State if it planned "to bring out a prior assault." The State responded that it would not broach the subject in its "case in chief and not on direct examination." Defense counsel then indicated that he was satisfied with the State's concession.

Later, during trial, Mrs. Batson testified to the circumstances of the assault. She explained that the couple was in bed together when Batson grabbed her by the throat, punched her multiple times, and put her "in a headlock." After pulling her "around the bed" and "flopping" her "all over the place," Batson put "a cord" around her neck and tried to strangle her, but the cord "came loose," so Batson put a pillow over her head, pushed her face into the mattress, and put his hands around her throat. At some point during the assault, Batson put her "on the edge of the bed" and inserted his penis into her rectum. According to Mrs. Batson, Batson continued to sexually assault her in this manner "for hours over and over again." Eventually, Batson permitted her to use the bathroom, where she pleaded with him to leave her alone. She eventually persuaded Batson to leave the house with her, and the two ended up going to meet her ex-husband, Rossi, at his house. Once there, Mrs. Batson reported the assault to Rossi, and the police were called.

The State also called Rossi as a witness. At the start of his testimony, the State requested a bench conference, at which the prosecutor informed the court that it planned to

ask Rossi whether Mrs. Batson said anything when she reported the assault to him. The prosecutor explained that Rossi "would indicate yes" and that Mrs. Batson told Rossi that Batson "did it again." The court eventually informed the State that Rossi's answer would be inadmissible and that the State would "have to ask him something else." The State agreed, and, during its direct examination of Rossi, the State did not ask Rossi about anything Mrs. Batson may have said upon reporting the assault. Rossi did testify as to Mrs. Batson's demeanor, appearance, and actions while at his house following the assault.

On cross-examination, defense counsel asked Rossi about his interaction with Mrs. Batson on the day of the assault:

> [DEFENSE]: And while at home, Angela Batson came into your home, right?
>
> [WITNESS]: Yes.
>
> [DEFENSE]: And Angela advised you that Kenneth Batson had physically harmed her, correct?
>
> [WITNESS]: Yes.
>
> [DEFENSE]: And you believed that because Angela Batson said that that happened, isn't that right?
>
> [WITNESS]: Yes.
>
> [DEFENSE]: And you didn't – again, you didn't see it happen, right?
>
> [WITNESS]: No.
>
> [DEFENSE]: And you don't know whether Angela was telling the truth, correct?
>
> [WITNESS]: No.

> [DEFENSE]: Because you weren't present when it happened, right?
>
> [WITNESS]: No, I wasn't.

On redirect, the State asked Rossi to expound upon his initial interaction with Mrs. Batson on the day of the assault:

> [STATE]: Now, Mr. Rossi, [defense counsel] asked you whether Angela said that Kenneth Batson had physically assaulted her and you indicated yes.
>
> [WITNESS]: Yes.
>
> [STATE]: What did she say that he did in terms of physically assaulting her?
>
> [WITNESS]: She come in the house and she said, "John, he did it again." She said, "Help, John. He did it again."
>
> [DEFENSE]: Objection.
>
> [STATE]: What did she say in terms of the specific – you know, the night before. That night.
>
> THE COURT: Wait. I'm sorry. I'm confused. Haven't we been over this?
>
> [STATE]: Yes, Your Honor, but I'm talking about the actual incident itself.
>
> THE COURT: Well, that would have been something brought up on direct. Not saved for now.
>
> [STATE]: Yeah, but the door was opened. It was in response to Counsel's questions about whether she had said anything about him assaulting her.
>
> THE COURT: Oh, I do remember that. I do remember that. All right. Overruled. Go ahead.

> [STATE]: So, Mr. Rossi, in terms of what had happened that previous evening, what did she say happened between herself and [Batson]?
>
> [WITNESS]: That they had been arguing and fighting pretty much the whole night and he was beating her up, holding her down, wouldn't let her go, wasn't trying to let her leave, choked her, forced himself on her.
>
> [STATE]: What did you mean by that? Did she say anything else in terms of him forcing himself on her?
>
> [WITNESS]: That he forced himself – that he forced her to have sex with him.
>
> [STATE]: Nothing further.

Batson was ultimately convicted of attempted murder and assault. This appeal followed.

DISCUSSION

I.

Batson first asserts that the circuit court erred in permitting Rossi to testify that, on the day of the assault, Mrs. Batson told him that Batson had previously assaulted her. Batson argues that Rossi's testimony constituted inadmissible "other crimes" evidence and was irrelevant and highly prejudicial. Batson also argues, in the alternative, that Rossi's testimony was inadmissible hearsay. Finally, Batson maintains that defense counsel's cross-examination of Rossi did not "open the door" to the admission of Rossi's testimony.

Before we can address the merits of Batson's argument, we must first discuss the circumstances under which the disputed testimony was given, as Batson has slightly mischaracterized the facts. When the prosecutor first broached the subject of Rossi's

conversation with Mrs. Batson on the day of the assault, the prosecutor referenced a specific question asked by defense counsel on cross-examination, namely, whether Mrs. Batson said that Batson had physically assaulted her. The prosecutor then asked Rossi, not what Mrs. Batson said, generally, but rather what Mrs. Batson said that Batson "did in terms of physically assaulting her."

For whatever reason, Rossi provided an answer that was unresponsive to the prosecutor's specific question and that referenced Mrs. Batson's statements regarding Batson's prior assault. When defense counsel objected, the prosecutor reiterated that he wanted to know what Mrs. Batson said in terms of "the night before." When the court interjected and informed the prosecutor that the subject should have been "brought up on direct," the prosecutor responded that "the door was opened" and that the line of questioning "was in response to counsel's questions about whether [Mrs. Batson] had said anything about [Batson] assaulting her." The court then permitted the prosecutor to continue his line of questioning, which he did by asking Rossi about what Mrs. Batson said "in terms of what happened that previous evening." This time, Rossi gave a responsive answer. Importantly, at no time did Rossi mention anything that Mrs. Batson said about the prior assault.

Thus, the record makes plain that the court did not "permit" Rossi to testify about the prior assault, nor did the court overrule Batson's objection to the admission of that testimony. Instead, after Batson lodged his initial objection, the court sought clarification from the State regarding its line of questioning and, upon getting that clarification, permitted the State to ask Rossi about details of the instant assault that were relayed to him

by Mrs. Batson. If Batson objected to that line of questioning -- which had nothing to do with the prior assault and did not elicit testimony to that effect -- then he should have brought it to the court's attention at the time. Clearly that is not the case, as Batson does not even raise the issue here.

If, on the other hand, Batson objected, as he does here, to Rossi's unresponsive answer regarding the prior assault, then Batson should have asked the court to make a ruling as to that objection. *See Abell v. Alpert F. Goetze, Inc.*, 245 Md. 433, 440 (1967) (issue not preserved where counsel failed to object to rephrased question and failed to request a ruling on objection to original question). Otherwise, Batson should have asked the court to strike Rossi's answer and instruct the jury accordingly. *See Holmes v. State*, 119 Md. App. 518, 523 (1998) ("An objection must be made when the question is asked or, if objectionable material comes in unexpectedly in the answer, then at that time by motion to strike."); *see also Clermont v. State*, 348 Md. 419, 429 (1998) ("The object of the motion to strike, which is usually accompanied by a request for an instruction to the jury to disregard certain evidence, is to remove matters which have not been properly admitted as evidence from the jury's consideration."). Absent (or in addition to) those remedies, if Batson believed that Rossi's testimony was so inflammatory and prejudicial that it irreparably tainted the jury, then the appropriate move would have been to ask for a mistrial.

The fact remains, however, that Batson did none of those things. Instead, Batson lodged his initial objection, remained silent while the court clarified the nature of the State's inquiry, failed to request a ruling as to his original objection, and then failed to

lodge any additional objection or ask the court to strike Rossi's testimony, instruct the jury, and/or declare a mistrial. In short, we cannot say the trial court erred in failing to grant Batson relief he never asked for, nor can we say that the trial court erred in addressing an issue that was not properly raised or even brought to the court's attention. Accordingly, the issue is not preserved for our review, and we decline to address it on appeal. *See* Md. Rule 8-131(a).

II.

Batson further asserts that the trial court erred in denying his motion to dismiss based on the State's failure to timely complete DNA testing of evidence collected from Mrs. Batson following the assault. Batson maintains that the State was required, pursuant to Section 2-504 of the Public Safety Article of the Maryland Code, to complete the test "as soon as reasonably possible following collection of the sample" and that he postponed his initial trial date on the condition that the State would complete the test. Batson also maintains that the State was required, pursuant to Section 6-103 of the Criminal Procedure Article of the Maryland Code and Maryland Rule 4-271(a)(1), to schedule his trial date no later than August 23, 2016. Batson avers, therefore, that he was faced with a "false and unfair choice" at his trial on August 8: to proceed with trial and forego his right to the DNA testing provided for by statute, or alternatively, to agree to a postponement, wait approximately two months for the results of the DNA testing, and thus waive his statutory right to have his trial held no later than August 23. Batson maintains that, under the circumstances, the appropriate remedy was for the court to dismiss the charges.

Batson is mistaken. Section 2-504 of the Public Safety Article of the Maryland Code states, in pertinent part, that "DNA evidence . . . collected as evidence of sexual assault at a hospital *that a law enforcement investigator considers relevant to the identification or exoneration of a suspect* shall be tested as soon as reasonably possible following collection of the sample." Md. Code (2003, 2011 Repl. Vol., 2016 Supp.), § 2-504(a)(3)(iii) of the Public Safety Article (emphasis added). The plain language of the statute makes clear that Batson did not have a statutory right to DNA testing. Rather, the statute simply requires that the State test certain DNA samples as soon as possible when a law enforcement investigator deems it relevant to the identification or exoneration of a suspect. Clearly that was not the case here, as the prosecutor stated that he did not deem the sample to be relevant and only agreed to have the DNA tested at the behest of defense counsel. Thus, Batson did not "forego" any statutory right by proceeding to trial.

To be sure, it is clear from the record that the State did agree to do the DNA testing and that Batson relied on that promise when he agreed to postpone his initial trial date of May 24, 2016. Moreover, because Batson (or his counsel) made his first appearance before the circuit court in this matter on February 25, 2016, Batson is correct that the State had a statutory obligation, under what is commonly referred to as the "*Hicks* Rule," to set his trial date no later than August 23, 2016. *See* Md. Code (2002, 2012 Repl. Vol.), § 6-103(a) of the Criminal Procedure Article ("CP") (providing that a defendant's trial date may not be later than 180 days after either the appearance of counsel or the first appearance of the defendant before the circuit court, whichever is earlier); Md. Rule 4-271(a) (same).

That said, we are not persuaded that the extreme sanction of dismissal was necessary, or even warranted. The State's failure to have the DNA tested in time for trial was, at worst, a discovery violation. *See* Md. Rule 4-263(k)(1) ("Discovery may be accomplished in any manner mutually agreeable to the parties."). In such instances

> the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Md. Rule 4-263(n).

"[I]n exercising its discretion regarding sanctions for discovery violations, 'a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances.'" *Raynor v. State*, 201 Md. App. 209, 228 (2011) (citations omitted). In cases involving bad faith on the part of the prosecution or a discovery violation that irreparably prejudices a defendant, an extreme sanction, such as a mistrial, may be justified, or even required. *Id.*

We have noted, however, that courts should implement drastic sanctions sparingly and that defendants should proceed with caution when seeking them out:

> The declaration of a mistrial, however, "is an extraordinary act which should be granted if necessary to serve the ends of justice." *Barrios v. State*, 118 Md. App. 384, 396-97, 702 A.2d 961 (1997) (quoting *Hunt v. State*, 321 Md. 387, 422, 583 A.2d 218 (1990)). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." [*Thomas v. State*, 397 Md. 557, 571 (2007)

> (citations omitted).] We have said that the purpose of the discovery rules "is to give a defendant the necessary time to prepare a full and adequate defense." *Ross v. State*, 78 Md. App. 275, 286, 552 A.2d 1345 (1989). And the Court of Appeals has warned that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, "the 'double or nothing' gamble almost always yields 'nothing.'" *Thomas*, 397 Md. at 575, 919 A.2d 49 (quoting *Jones v. State*, 132 Md. App. 657, 678, 753 A.2d 587 (2000)).

Raynor, 201 Md. App. at 228 (2011).

Here, the circuit court carefully considered the circumstances of and reasons for the State's failure to timely complete the DNA testing and found that it was an "oversight" and that there was nothing "underhanded" or "sneaky" about it. The court then offered Batson the limited but reasonable remedy of a postponement. Batson, after conferring with counsel, declined the court's request and made the conscious decision to move forward with trial. Under the circumstances, we cannot say that the court abused its discretion in refusing to grant Batson the extreme sanction of a dismissal. *See Thomas*, 397 Md. at 570 ("[T]he presiding judge has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary.").

As for Batson's contention that he faced a "false and unfair choice" regarding his rights under the *Hicks* Rule, we find that argument purely speculative and without merit. Although the *Hicks* Rule mandates that a defendant be brought to trial within 180 days of his (or his attorney's) first appearance in circuit court, that mandate is not applied absolutely. Maryland Rule 4-271 and Section 6-103 of the Criminal Procedure Article both provide that, on motion of a party or initiative of the circuit court, the county

administrative judge or that judge's designee may postpone a defendant's trial date beyond 180 days for good cause shown. Md. Rule 4-271(a)(1); CP § 6-103(b). Any determination as to what constitutes good cause "is dependent upon the facts and circumstances of each case as the administrative judge, in the exercise of his discretion, finds them to be." *State v. Toney*, 315 Md. 122, 132 (1989) (footnote omitted).

Here, had the court ultimately postponed Batson's trial date beyond the 180-day time limit, the reason for the delay would have been so that the State could complete the DNA testing, which was requested by defense counsel and was for Batson's sole benefit. Thus, we cannot agree with Batson's contention that "no reasonable court could have found good cause." The "cause" for the postponement would have favored Batson and was, as previously discussed, a reasonable remedy to the State's failure to hold up its end of the bargain and complete the testing by trial. *See Peters v. State*, 224 Md. App. 306, 358, 59 (2015) (denial of motion to dismiss for an alleged *Hicks* violation was proper where the court "rationally could [have found] that awaiting the results of DNA testing . . . amounted to good cause."); *Ross v. State*, 117 Md. App. 357, 364-65 (1997) ("The good cause determination is 'rarely subject to reversal upon review.'") (citations omitted).

In the end, however, such arguments are purely hypothetical because Batson never asked the court to make a "good cause" determination. In fact, Batson never raised the *Hicks* issue when arguing his motion to dismiss before the circuit court. Rather, Batson sought a dismissal based on the State's failure to obtain the DNA testing, which the court denied. The court then suggested a postponement so that the testing could be completed. Had Batson wanted to wait for the DNA testing that, again, was for his own benefit, Batson

had that option. *See Jules v. State*, 171 Md. App. 458, 475 (2006) (noting that a defendant may consent to a postponement beyond the 180-day time limit). For whatever reason, Batson rejected the court's suggestion and made the conscious decision to go to trial. We cannot say, therefore, that Batson's rights under the *Hicks* Rule were implicated or that he was given a "false" or "unfair" choice. To the contrary, Batson was given a choice that was reasonable under the circumstances and comported with the relevant statutes and rules. We hold that there was no error by the trial court and, therefore, affirm the judgments of conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.